Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's Rules	)	
Regarding a Plan for Sharing	)	WT Docket No. 95-157
the Costs of Microwave Relocation	)	RM-8643

PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION

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SUMMARY

Tenneco Energy ("Tenneco") supports the Commission's ongoing efforts to develop and maintain a plan that promotes the safe and expeditious relocation of 2 GHz microwave incumbents while ensuring that incumbents are made whole for the costs of relocation. The rules adopted by the Commission largely serve these goals.

Because Tenneco is actively negotiating with A and B Block PCS licensees pursuant to the rules, Tenneco requests clarification of the new rule providing a "right-of-access" for PCS licensees to Tenneco's microwave sites. Tenneco recommends that explicit limits be placed on this right-of-access to prevent unreasonable demands by PCS licensees, and to prevent abuses or harassment of incumbents during relocation negotiations, and to allow the incumbents to meet their statutory and regulatory obligations to protect public safety and the environment along the pipeline right-of-way.

Moreover, Tenneco seeks reconsideration of aspects of several rules that do not serve the goal of making incumbents whole and promoting expeditious band clearing. These rules include: (1) the cost-sharing reimbursement trigger; (2) the new rule allowing PCS licensees who qualify as designated entities to make time payments on their cost-sharing obligations; (3) the new "comparable throughput" standard allowing PCS licensees to provide incumbents with inferior microwave facilities; (4) the new two-percent cap on reimbursement for an incumbent's

legitimate and reasonable transaction costs; and (5) the new ten-year sunset period on a PCS licensee's reimbursement obligations under the cost-sharing plan

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Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, Tenneco Energy ("Tenneco"), by its attorneys, hereby respectfully requests clarification and partial reconsideration of the Federal Communications Commission's First Report and Order ("First R & O") adopted April 25, 1996, in the above-captioned proceeding.[1/] Throughout this proceeding, Tenneco has supported the Commission's efforts to maintain a transition plan for the 1,850 to 1,990 Mhz band that promotes the safe and expeditious relocation of 2 GHz microwave incumbents and ensures that incumbents are made whole for their costs of relocation. Consistent with this support, Tenneco has emphasized that any relocation under the plan must not disrupt the critical public safety functions of its large multi-MTA/BTA microwave system which provides critical communications along its 19,000 mile interstate natural gas pipeline

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1/ First Report and Order and Further Notice of Proposed Rule Making, FCC 96-196 (April 30, 1996), 61 Fed. Reg. 29,679 (1996) ("First R & O" or "Further Notice").

Because Tenneco is actively involved in voluntary negotiations with several A and B Block licensees, clarification of new Section 107.71 regarding a PCS licensee's right to gain access to an incumbent's facilities to prepare a relocation cost estimate is very important. Moreover, several rules adopted in the First R & O do not ensure that incumbents will be made whole for their costs of relocation, or that band-clearing will be expeditious. For the reasons set forth below, Tenneco requests reconsideration of certain aspects of: (1) Section 101.75(b)(1) regarding "throughput" for comparable facilities; (2) Section 101.79 regarding the ten-year sunset for PCS entities' reimbursement obligations; (3) Section 101.75(a)(1) regarding a two percent limit for the recovery of the transaction costs of incumbents; (4) Section 24.247 regarding reimbursement obligations under the cost-sharing plan; and (5) Section 24.249(b) regarding time payments by C Block licensees under the cost-sharing plan.

I. THE NEW "RIGHT OF ACCESS" TO INCUMBENTS' FACILITIES SHOULD BE CLARIFIED

Section 101.71 of the Commission's new rules provides that if the parties have not reached an agreement within one year of the commencement of the voluntary period, the private operational fixed microwave service ("FMS") licensee must allow the PCS licensee (if it so chooses) to gain access to the existing facilities to be relocated so that an independent third party can examine the FMS licensee's 2 GHz system and prepare an

estimate of the cost and the time needed to relocate the FMS licensee to comparable facilities.[2/]

This new rule provides inadequate guidelines to both microwave incumbents and PCS licensees concerning the nature and extent of the access that an incumbent must provide. It is unclear whether the Commission intends for the PCS licensee itself to have a right of access, or an independent third party, or both. In addition, neither the rule nor the related discussion in the Report and Order provides any guidance on the frequency of access an incumbent must provide to each PCS licensee or independent consultant. Incumbents operating microwave systems for pipeline safety at secure and geographically dispersed sites require clarification from the Commission. Tenneco recommends that explicit limits be placed on this right of access to prevent unreasonable demands by PCS licensees, and to prevent abuses or harassment of incumbents during relocation negotiations, and to allow the incumbents to meet their statutory and regulatory obligations to protect public safety and the environment along the pipeline right-of-way.

Unlimited or unaccompanied access to Tenneco's microwave facilities is not feasible. The cost of assigning personnel to accompany multiple PCS licensees and numerous third parties on numerous occasions to each transmitter site in the microwave system could become extremely time-consuming and costly. It is reasonable that either the PCS licensee or one

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2/ 61 Fed Reg. at 29,694 (to be codified at 47 C.F.R. § 101.71).

consultant designated by that PCS licensee should have the right to visit or inspect the microwave facilities of a specific incumbent's system one time. If additional visits or inspections of the facilities are requested by the PCS licensee or the consultant on behalf of that PCS licensee, the PCS licensee should be required to bear the incumbents' costs of providing accompanied access for each subsequent visitation or inspection. Finally, the PCS licensees should be required to follow all state and federal regulations related to their activities at the sites. This would necessarily include the requirements imposed on the incumbent by the Federal Energy Regulatory Commission and the Department of Transportation.[3/]

II. THE COST-SHARING REIMBURSEMENT PLAN SHOULD CONSIDER INTERFERENCE TO PCS SYSTEMS FROM MICROWAVE SYSTEMS, AND SHOULD NOT PERMIT TIME PAYMENTS BY C BLOCK LICENSEES

Pursuant to the First R & O, the reimbursement obligation is triggered only if a PCS licensee's system "would have caused interference to a microwave link."[4/] This approach fails to take into account that interference runs both ways. In many cases, but for their prior relocation by another entity, microwave links would have interfered with the operation of a subsequent PCS system. In such a case under the existing rules,

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3/ Upon the staff's request, Tenneco will provide the Commission with a description of such requirements for interstate natural gas pipelines.

4/ First R & O, Appendix A at ¶ 29 (emphasis added); See also NPRM at ¶ 55.

the subsequent PCS licensee would avoid any reimbursement obligations to the relocator, whether a PCS licensee or an incumbent.

Such a result is contrary to the spirit of the Commission's policy for cost sharing. Tenneco therefore requests reconsideration of the cost-sharing reimbursement trigger to ensure that PCS licensees are responsible for cost-sharing obligations whenever they benefit from a relocated link -- whether the benefit derives from avoidance of interference to a microwave link, or whether it derives from avoidance of interference from a microwave link.

New Section 24.259(b) provides that qualified PCS licensees under the designated entity rules will have installment payment options available to them under the cost-sharing plan. This rule may have the unintended effect of discouraging system-wide relocations. Moreover, its application to reimbursement of incumbents who may self-relocate their links (assuming the proposal for incumbent cost-sharing participation is adopted), would be grossly unfair.

The installment payment option for designated entity PCS licensees will likely deter A and B block PCS licensees from offering large-system incumbents system-wide coverage for relocations. A and B block licensees will be much less willing to pay for the relocation of C block links in an incumbent's system if they must wait up to ten years to be fully reimbursed for the relocation of these links. This presents incumbents with

the undesirable situation of having their links relocated in a piecemeal fashion over an undetermined period of time. Such piecemeal relocation will not only be inconvenient and more costly, it may also adversely impact a system's vital safety functions.

Tenneco suggests that the Commission eliminate the time payment plan for designated entities provided in Section 24.249(b). As is indicated by the identity of the financial backers of many C block bidders and the results of C block auction, many so-called "designated entities" seem to have more than adequate financial resources to pay in full the costs of microwave relocation.[5/] Requiring them to make reimbursement payments in full would encourage system-wide relocations and promote expeditious band-clearing. If, however, the Commission decides not to eliminate the instalment payment plan for designated entities and decides to adopt rules permitting incumbent participation in the cost-sharing plan, the Commission should ensure that time payments are not permitted for payments owed to incumbents under the cost-sharing plan.

In the Further Notice, the Commission proposed that microwave incumbents be allowed to obtain reimbursement under the

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5/ The PCS C block spectrum auction raised $10.2 billion (Communications Daily, May 7, 1996).

cost-sharing plan for links that they self-relocate.[6/] Tenneco supported this proposal but urged the Commission to harmonize other aspects of the 1.9 GHz transition plan with this proposal, including the installment payment plan provided in Section 24.259(b).[7/] If the proposal is adopted, Tenneco recommends that the Commission reconsider and revise Section 24.249 to include the following subsection:

> (c) Cost-Sharing Payments to Microwave Incumbents. Notwithstanding § 24.249(b), payments made to microwave incumbents under the cost-sharing plan shall be paid in full by the first PCS licensee to initiate service employing the spectrum cleared by the incumbent's self-relocation.

In the absence of such a provision, incumbents who self-relocate their links would be forced to underwrite the buildout of the PCS licensees who have necessitated the substantial inconvenience of relocation. Requiring all PCS licensees to reimburse incumbents in a single lump-sum payment for self-relocations, without regard to the designated entity status of the PCS licensee, is consistent with the goal of expeditious clearing of the 1,850 to 1,990 MHz band. Incumbents will be more willing to accept the risks of self-relocation if they are assured that they will be paid in full by all PCS licensees who enjoy the benefits of such band-clearing.

III. "COMPARABLE THROUGHPUT" SHOULD MEAN THAT INCUMBENTS WILL BE MADE WHOLE

6/ Further Notice at ¶ 99.

7/ Comments of Tenneco to Further Notice at 6, filed May 28, 1996.

While Tenneco is making every effort to ensure that its microwave system will not become subject to involuntary relocations, it remains concerned about the standards to be used by the Commission to determine the compensation for incumbents under such circumstances.[8/] In the First R & O, three factors will determine when a replacement facility is deemed comparable to the incumbent's prior facility: communications throughput, system reliability, and operating cost.[9/] Unfortunately, the standard for "comparable throughput" will likely result in under-compensation of incumbents.

New Section 101.75(b)(1) requires PCS licensees to provide "... FMS licensees with enough throughput to satisfy the FMS licensee's system at the time of relocation, not match the total capacity of the FMS system."[10/] Under this rule, replacement systems may indeed provide less overall capacity than the incumbent's original by failing to take into account: (1) the expansion capacity in existing facilities that an incumbent originally purchased; and (2) the capacity required for peak load throughput that may be required on an irregular basis over the

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8/ There are no assurances in the rules that PCS licensees will be reasonable in their offers during the voluntary negotiation period, and there are no guarantees that PCS licensees will actually negotiate after commencing mandatory negotiations. Therefore, reasonable, proactive incumbents may find themselves faced with involuntary relocations.

9/ First R & O at ¶ 27.

10/ 61 Fed. Reg. 29,679, 29,694 (1996) (to be codified at 47 C.F.R. § 101.75(b)(1)) (emphasis added); See also First R & O at ¶ 29.

course of a year. Implicit in this rule is the incorrect assumption that any unused capacity in an existing system at the time of an inspection is unnecessary Tenneco requests that the Commission reconsider this rule and require a PCS licensee to provide an incumbent with the overall throughput capacity it possessed prior to an involuntary relocation.

IV. THE TEN YEAR SUNSET WILL RETARD BAND-CLEARING EFFORTS

New Section 101.79(a) provides that "ET licensees are not required to pay relocation costs after the relocation rules sunset."[11/] This rule is flawed in several respects. First, as numerous commenters stated, the notion of a sunset is fundamentally at odds with the policy of making incumbent's whole.[12/] It will likely have the unintended effect of delaying band-clearing, especially in rural areas. A fundamental tenet of the Commission's policy regarding the transition is to make incumbent's whole. As other parties observed in their comments on the Notice of Proposed Rule Making[13/] ("Notice") in this proceeding, if between now and the April 4, 2005, a PCS entity has not identified an interference problem with an FMS licensee, then there is no reason why the incumbent should have to

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11/ Id. at 29,695 (to be codified at 47 C.F.R. §101.79(a)).

12/ See e.g., Comments on Notice of Proposed Rule Making, WT Docket No. 95-157, 11 FCC Rcd 1923 (1995) ("Notice") of: AAR at 8-9; AGA at 5; API at 19; UTC at 12.

13/ Notice of Proposed Rule Making, WT Docket No. 95-157, 11 FCC Rcd 1923 (1995) ("Notice") at ¶¶ 70-78.

relocate.[14/] Moreover, if PCS-to-microwave interference becomes a problem after 2005, there is no reason why relocation costs should not be paid at that time. Under the current rule, if interference results, not only does the incumbent have to move out of the band, but the incumbent will receive no compensation for the costs associated with the move. The remaining useful life of microwave equipment now owned by incumbents may well exceed the period ending in April, 2005.

The current rule does not serve the Commission's other fundamental goal in the transition -- expeditious clearing of the 1,850 to 1,990 MHz band. As noted by the Commission in the First R & O, several commenters stated that this rule encourages some PCS licensees to "wait out" incumbents to avoid reimbursement obligations under the cost sharing plan.[15/] By postponing deployments in rural areas until after the sunset, PCS licensees would minimize their relocation costs at the expense of rural populations and expeditious band clearing. Among other things, this type of gamesmanship may result in the filing of an increasing number of formal interference complaints by FMS incumbents.

If the sunset rule is to stand, then the Commission should harmonize this rule with the current cost sharing rules and its proposal regarding the creation of rights under the cost sharing plan for incumbents that self-relocate. In particular,

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14/ See, e.g., Comments of: UTC at 32; APCO at 12; APPA at 5-6.

15/ First R & O at ¶ 62.

if an incumbent self-relocates before the sunset, the reimbursement rights should continue to exist for a reasonable length of time beyond the sunset date. Specifically, any claims filed by an incumbent or a prior PCS licensee prior to the year 2005 should remain viable until the year 2010.

V. THE LIMITATIONS ON RECOVERY OF TRANSACTION EXPENSES DURING INVOLUNTARY RELOCATIONS LACK SUFFICIENT JUSTIFICATION

New Section 101.75(a)(1) provides that in an involuntary relocation, a PCS licensee is required to guarantee payment of actual relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses subject to a cap of two percent of the hard costs involved.[16/]

The Commission derived the two percent cap by dividing one commenter's suggested cap amount by an arbitrary estimate of the average per link relocation cost and stated that "a two-percent cap is reasonable and strikes a fair balance between the concerns of PCS licensees and microwave incumbents."[17/] This cap is arbitrary and capricious, and wholly lacking any rational basis.

Equally troubling is the provision that "ET licensees are not required to pay for the transaction costs incurred by FMS

16/ 61 Fed. Reg. at 29,694 (to be codified at 47 C.F.R. §101.75(a)(1)). The Commission defines hard costs as the "actual costs associated with providing a replacement system, such as equipment, and engineering expenses." Id.

17/ First R & O at ¶ 43.

licensees during the voluntary or mandatory periods once the involuntary period is initiated."[18] This is grossly unfair to an incumbent who, through no fault of its own, participated in good faith during the voluntary and mandatory negotiation periods with a PCS licensee that failed to make acceptable offers. Further, this rule may provide incentives for PCS licensees to delay the closing of otherwise successful mandatory relocation negotiations in order to avail themselves of reduced obligations for transaction costs in an involuntary relocation.

Tenneco respectfully requests reconsideration of those portions of Section 101.75 that allow PCS licensees to avoid reimbursement of an incumbent's reasonable transaction costs. Rather than setting an arbitrary limit on the percentage of transaction costs recoverable or allowing PCS licensees to avoid reimbursing these costs altogether, the Commission should simply require that all reasonable transaction costs incurred by an incumbent during relocation negotiations with the PCS licensee must be reimbursed by that PCS licensee. Any disagreements over the reasonableness of transaction costs could be settled according to the dispute resolution procedures adopted by the Commission in the First R & O.[19] Such a rule would further the Commission's goal of making incumbents whole during relocations.

18/ 61 Fed. Reg. at 29,694 (to be codified at 47 C.F.R. §101.75(a)(1)).

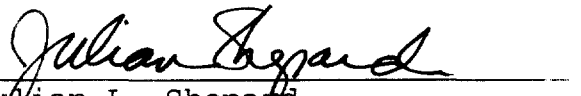
19/ First R & O at ¶¶ 78-80.

VI. CONCLUSION

For the foregoing reasons, Tenneco respectfully requests that the Commission clarify and partially reconsider the new rules discussed above. In order to balance fairly the burdens placed on incumbents and PCS licensees resulting from microwave relocation, the Commission must ensure that incumbents are made whole as a result of involuntary relocations. Clarification and revision of the rules as proposed herein will complement the Commission's goals for the 2 GHz microwave relocation rules.

Respectfully submitted,

Tenneco Energy

By: 
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